IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

MAGAGNOLI, et al.,	:	5:15-cv-03386-JLS
Plaintiffs,	:	ALLENTOWN, PA
	:	
vs.	:	
	:	
WEGMANS, et al.,	:	September 22, 2015
Defendants.	:	10:10 a.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE JEFFREY L. SCHMEHL
UNITED STATES DISTRICT JUDGE

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ESR OPERATOR: United States District Court for the Eastern District of Pennsylvania is now in session. The Honorable Jeffrey L. Schmehl presiding.

THE COURT: Good morning, everyone. We're here today for an oral argument in the case of, I'll say, Magagnoli versus Wegmans, et al.

Will everybody please identify themselves for the record and who they represent.

MR. MONGELUZZI: Robert Mongeluzzi and Dave Kwass for the Plaintiffs Magagnolis.

MR. LEARY: Paul Leary for Defendant Wegmans.

MR. GARTNER: And Francis Gartner for Defendant Elizabeth Mardouchoc.

THE COURT: All right. It's my understanding this case started in the Common Pleas court of Philadelphia and it was removed by Defendant Wegmans to federal court.

And now plaintiffs have filed a motion to remand it back to Philadelphia --

MR. MONGELUZZI: Yes, Your Honor.

THE COURT: -- or back to somewhere else?

MR. MONGELUZZI: Back to Philadelphia, Your Honor.

THE COURT: All right. Then you have the floor.

MR. MONGELUZZI: Thank you, Your Honor. Robert Mongeluzzi, again, for the plaintiffs.

Defendant Wegmans has removed this case based upon the alleged joinder or original suit against the purchaser, Ms. Mardouchoc, of a Bird Brain gel pot.

Your Honor, I have brought with us today the packaging for the gel pot, and I believe that there are photographs that have been attached to our motion showing all the sizes.

THE COURT: Yeah, I'm kind of familiar with the products. I mean, I don't -- you know.

MR. MONGELUZZI: Okay. Thank you, Your Honor.

I --

THE COURT: I don't think [indiscernible].

MR. MONGELUZZI: I show you the box because the box and a portion of the gel pot are of critical importance in deciding this motion to remand.

We were able to find an exemplar gel pot also made by Bird Brain which also comes with this packaging, and on this packaging is clear warnings and instructions as to how to safely use the product.

The packaging also indicates that the product comes with a -- I will call it a lid snuffer. And that's a lid that goes over the gel pot and then suffocates the fire inside and is the most efficient way to put out a gel pot, because you may not be able to see it burning.

Our -- pardon my back, Your Honor.

Our clients got this as a gift. When they received it as a gift, there was no box, and there was no lid snuffer with it.

The issue in this case is, how did it get in that condition, and who was responsible for the failure to supply the Magagnolis with the box, packaging, instructions, and lid snuffer? And that's the issue that this -- that goes to the heart of this case.

Now, we -- I'm going to start with the law, Your Honor. Then I want to go into what we believe the facts are and the legal standard under which we have sued Ms. Mardouchoc.

The law is pretty clear that removal

statutes are to be strictly construed against removal and all doubts should be resolved in favor of the remand. And that's the Batoff case, 977 F.2d 848 at 851 (3d Cir. 1992).

The standard -- and party -- both parties have briefed this -- is that joinder is fraudulent when there is no reasonable basis or colorable ground supporting the joined defendant or no real intention in good faith to prosecute the action against that defendant and seek that judgment.

That defendant, by the way, Ms. Mardouchoc, has a homeowner's policy and is defended by an attorney, and it has been and continues to be our intention to prosecute this case against her.

The defendant has the weighty burden of establishing there's no reasonable basis or colorable ground supporting the joined defendant. They cannot do that because there are weighty reasons why we joined this defendant and because there are facts that still remain to be resolved which will be the litigation battleground of this case.

The Batoff and Brisco [ph] case hold that if there's even a possibility that a state court would find that the Complaint states a cause of action against any one of the resident defendants, the federal court must find the joinder was proper.

And that is if there's even a possibility, And I'm going to explain why it's beyond a possibility but a probability, Your Honor.

They must establish that our claim is wholly insubstantial and frivolous. The court must focus on the plaintiffs' Complaint at the time the petition for removal was filed and must assume as true all of the allegations in the Complaint and resolve any uncertainties as to the state of the controlling substantive law in favor of the plaintiff.

Plaintiffs' Complaint, Your Honor, sued Ms. Magagnoli -- Ms. Mardouchoc and alleged -- excuse me one second; let me get to it -- at 65C, giving the firepot and firepot fuel gel to the plaintiffs without the packaging and giving the firepot fuel gel without ensuring that all proper warnings were included.

It is plaintiffs' theory that Ms. Mardouchoc bought the product with the packaging, removed the gel pot from the box, and merely gave the Magagnolis the gel pot without the essential safety warnings that were contained in the box --

THE COURT: There's nothing in that box, right?

MR. MONGELUZZI: Correct, Your Honor. We have the gel pot outside, but given the state of security, we did not want to bring in a metal pot with fuel inside. Although, if Your Honor wants it, we can bring it in. It's out in one of the cars.

THE COURT: Okay. Well, I'm looking at the picture, and the flame is coming out of the top, right?

MR. MONGELUZZI: Correct, Your Honor.

THE COURT: So the snuff lid or whatever you call it is probably, like, only the size of the opening and goes over it?

MR. MONGELUZZI: Absolutely, Your Honor.

THE COURT: All right.

MR. MONGELUZZI: And it has a little --

Dave, it has a little handle?

MR. KWASS: Yes.

MR. MONGELUZZI: -- like a little handle so you don't have to put your hand like this. It looks like a pancake griddle, except it's round.

So that's plaintiffs' essential theory of the case, that they didn't get the box and they didn't get --

ARGUMENT - MR. KWASS

THE COURT: So what actually happened, though? It was on, and somebody was trying it?

MR. MONGELUZZI: No. The -- I'll let Dave describe the facts because he's -- if I may, Your Honor. He's more intimate, and I don't want to get the facts wrong.

THE COURT: All right.

MR. KWASS: Your Honor, Dave Kwass for plaintiffs.

So this product was purchased at Wegmans by Ms. Mardouchoc in May of 2011. It was gifted to the Magagnolis just three days or so after that purchase. It does not get used in the summer of 2011 by the Magagnolis. They use it in August of 2012 for the first time, 15 months later.

And at that time, as Mr. Magagnoli is attempting to use the -- a refill canister of fuel gel to refill the canister cup that sits inside the firepot itself --

THE COURT: Why would it have to be refilled if it was never used?

MR. KWASS: Sorry. He had -- he was using it that day for the first time --

THE COURT: So he was filling it, not refilling it.

MR. KWASS: He was refilling it, Your Honor. So it had been filled once that day.

THE COURT: Oh, okay.

MR. KWASS: It had burned down.

THE COURT: All right. Got it.

MR. KWASS: And this is the problem with the product. You can look inside of it, and it looks as though there is no flame left.

And so as no flame -- as it appeared to him that no flame was left, he then poured or squirted fuel gel out of the refill container into the firepot itself, and that's what caused the flash fire that burned his son.

And because of the way in which the fuel gel works, when the fire flames up, there's literally gel that comes out of the firepot, and that makes it very, very difficult to extinguish the flames.

So the flames get onto Baby Luca, and his mother then -- then holds him, and the gel transfers to her, burning her.

Does that answer the court's question?

THE COURT: Yes.

MR. MONGELUZZI: So our theory against Ms. Mardouchoc is that she gave the gel pot without the snuff lid and without the box and that that was causative of the accident.

At her deposition, she denied that. She said, no, I bought it, and it was loose; it came without a box; it came without a snuff lid.

Interestingly, we alleged against Wegmans that they sold it to Ms. Mardouchoc -- and this is at paragraph 69R -- that they sold and supplied and distributed the firepot without its packaging.

We pled alternatively, Your Honor, since we didn't know who had failed to include the packaging and the snuff lid.

Wegmans, in their Answer, denied that. So the state of the record is Wegmans denies that they didn't give her the packaging. Their answer is, we deny that, meaning we did give her the packaging.

Ms. Mardouchoc says, I bought it, and it didn't have the packaging.

Obviously, that is a material issue of genuine fact and something that should not permit this court to rule that the claim against her is frivolous.

We have not yet had the opportunity to depose Wegmans or the opportunity to depose Bird Brain because we filed the motion to remand within 30 days of their removal petition, as we're required to do so under the law.

I doubt that Wegmans is going to come in and say -- although, perhaps, they might -- that yes, the manufacturer, Bird Brain, manufactures this with a box with critical safety information and with a critical component, a lid snuffer, and we decided to pull it out of the box and not give it to the customers.

Maybe they are going to say that in the future. Maybe they are not. But at this stage in the litigation, the claim that our claim against Ms. Mardouchoc is frivolous and was filed fraudulently must fail.

There are multiple situations in which Ms. Mardouchoc could be found responsible, and I just wanted, if I might, Your Honor, to go through those scenarios, because I want to establish that our claim wasn't frivolous.

If Bird Brain manufactured and sold the gel pot with the snuffer in the box to Wegmans and Wegmans sold it in that condition to Ms. Mardouchoc and then she withheld the box and the snuffer from the plaintiffs, she would be responsible under 388.

Your Honor, once I go through these

scenarios, I'm just going to discuss 388 briefly and why I believe all of these scenarios fit within 388.

So that's scenario number one, where clearly, without question, Ms. Mardouchoc would be negligent.

Use the same scenario; snuffer, box from the manufacturer, Bird Brain, to Wegmans, Wegmans, snuffer and box to her. This product was recalled in between the time of its sale to Ms. Mardouchoc and the accident.

She purchased this as a Wegmans --

Dave, what was the word? Best buy? Didn't you tell me she had a card, a --

MR. KWASS: Oh, a rewards card.

MR. MONGELUZZI: A rewards card, Your Honor, and there was evidence of that sale.

We do not know at this stage but we have claimed in our Complaint issues regarding the recall. Did Wegmans send a recall notice to Ms. Mardouchoc, which she got and then never forwarded to the plaintiffs? We don't know that, but it is alleged.

Or did Wegmans know about the recall, which they tweeted about, had the information in their computer files, and do nothing about it? We don't have the answer to that question, but at this stage, it's clear that we have not proceeded frivolously.

Scenario number three -- Bird Brain sells the gel box [sic] with the snuffer and box to Wegmans, who then sells the gel box with the snuffer -- or the gel pot with the snuffer in no box to Ms. Mardouchoc, which is scenario number three.

At that point, Ms. Mardouchoc would have the responsibility, even though she didn't get the box, to at least give them the snuffer lid. That would find her responsible. That's scenario number three.

Use that same scenario and add in the same recall issue as to whether or not she was told that there was a recall and did nothing about it. That's scenario number four.

Scenario number five, Bird Brain sells the gel pot to Wegmans with the box but no snuffer, and they -- Wegmans sells the gel pot with the box to Ms. Mardouchoc, but she doesn't give the box to the Magagnolis. That's scenario number five. She would be responsible under that under 388.

Add on to that same set of facts the recall issue. That brings us to scenario number six.

Let's go to scenario seven. Bird Brain

sells the gel pot with the snuffer but no box to Wegmans. Wegmans sells the gel pot with the snuffer to Ms. Magagnoli, but she only gifts the gel pot and doesn't give them the snuffer. That's scenario number seven.

If you add those same facts and the recall issue, that's scenario number eight.

Scenario number nine, Bird Brain sells the gel pot without the box and the snuffer to Wegmans. Wegmans sells it to Mardouchoc in the same condition, but they notify Ms. Mardouchoc of the recall. That would still hold her responsible, because she would have that specialized knowledge that plaintiffs would not have.

The only potential scenario in which they could claim that -- after discovery -- not at this pleadings stage, but after discovery -- where they could arguably argue that there would be no claim is that if Bird Brain or Wegmans sells it to Ms. Mardouchoc without the snuffer box, without -- I'm sorry -- without the snuffer lid, without the box, and doesn't advise her of the recall.

The defendant today could have come in with affidavits to you, Your Honor, and said, despite what was pled in the Complaint, we sold this without a box; even though Bird Brain gave us the box, even though it had safety instructions, we made a decision we're going to sell products to our clients [sic] without that critical safety information.

And, in addition, they could have had an affidavit saying, and we -- we sold it without the snuffer lid as well, and therefore, this woman -- and by the way, when we knew that the product was recalled, we intentionally didn't tell her either.

They could have come in with those affidavits and said, you know what, Ms. Mardouchoc really doesn't have any potential role in this case because we didn't provide Ms. Mardouchoc with any of the information.

Now, Ms. Mardouchoc testified that she didn't get that information, but she is a party opponent. She is on the other side. She testified, quote, that I thought something was wrapped around it when I bought it -- I want to be correct -- there might have been something wrapped around the gel pot, but I'm not sure. So her memory about that is somewhat unclear.

We haven't gotten the information from Bird Brain. We haven't gotten the information from Wegmans. And I suspect, as has been pled in our

Complaint -- alternatively, I acknowledge -- that we're going to find that they take the position that they sold it with the appropriate box and lid to Ms. Mardouchoc.

THE COURT: Is Mr. Leary representing Bird Brain, or they don't have counsel, or they don't -- are they out of business or what?

MR. LEARY: Yeah, they're -- they don't counsel here.

THE COURT: Yet?

MR. LEARY: No, they don't have counsel at all.

MR. MONGELUZZI: In the email exchange, when Mr. Leary was questioning Mr. Kwass about what our theories are and Mr. Kwass invited Mr. Leary to say, okay, let's -- why don't you guys stipulate that Ms. Mardouchoc didn't have anything to do with it, why don't you stipulate that it came without the warnings and the snuffer, he said -- and I'm reading from his email -- I don't understand why her dismissal is contingent on Wegmans agreeing that it sold the gel pot to Ms. Mardouchoc without any product packaging; I don't think dismissal should be contingent on Wegmans agreeing that it will not contend Mardouchoc failed to do anything in any way that contributed to the accident.

So as counsel tried to work this out and go over what the good-faith basis was, Wegmans' attorney has taken the position that Wegmans won't agree that Mardouchoc failed to do anything that in any way contributed to the accident.

How could they claim that this is a frivolous case against Mardouchoc when they will not say themselves that she -- we won't say that she did anything wrong; we -- we're going to come up and stand up and say that.

In fact, they're playing a -- it's a gamesmanship, where they intend to blame Mardouchoc, point the finger of blame at Mardouchoc, and then accuse us of frivolously suing her.

THE COURT: All right, Counsel. I really do think I understand your point, and I think I need to hear from the other side.

MR. MONGELUZZI: Thank you, Your Honor. And I could elaborate on 388 and why her --

THE COURT: I will give you rebuttal if I feel it's necessary.

MR. MONGELUZZI: Thank you, Your Honor.

MR. LEARY: Thank you, Your Honor.

Let me just make sure the record's

clear. Mr. Mongeluzzi wasn't at the deposition of Ms. Mardouchoc, and I fear he may not have even read her transcript, because, first of all, there isn't one shred of evidence from her deposition testimony to suggest that she did anything other than, on a night when she was looking to get food and a possible housewarming gift for her hairstylist friend, Mr. Magagnoli, she came across a display of firepots.

And she took one off the shelf, she put it in a bag, she left it at her house for two days, and two days later, she left it at the home of the Magagnolis as they were enjoying a housewarming gift [sic].

There isn't a shred of evidence to suggest that she took it, removed packaging, or had any knowledge or any notice that there was a problem with this.

He also claims that we're somehow taking an alternative position. He cites to paragraph 69R, I believe, about -- where they say selling, supplying the firepot without packaging, and we denied it. That's Count 4 to Bird Brain. That's not to us. They didn't allege that against us. They haven't alleged that against us. That's to Bird Brain.

And maybe Bird Brain did sell it to us

without the packaging. We're not here -- that's not the issue before the court. There's, frankly, two issues, Your Honor.

First, given the information that we received that we were entitled to explore and of which this court can consider, there is no doubt that there is no basis in law or fact to hold a claim against Ms. Mardouchoc.

First, they presume that she was aware that this product, when she bought it, should have had packaging.

If you look at their Complaint, 66A through D are out as a matter of law. Number one, purchased the firepot without the packaging, purchased it without ensuring all proper warnings were included, giving the firepot to plaintiffs without the packaging, giving the firepot without ensuring all proper warnings were included.

That, under Restatement 388, is out the door, Your Honor, and here's why. I cite to the case of Lockett of which, of course, their response is dead silent. They don't offer any case law except for some cases from Minnesota.

And the Lockett case made clear, Your Honor, a supplier of a chattel has no duty under

Section 388 to test or inspect or even make a cursory examination to the existence or nonexistence of a dangerous condition. 388 requires only that the supplier warn of those dangers which he or she is actually aware of.

That applies to me. That applies to you, Your Honor. There is no obligation when you go, as they -- their theory subscribes, that you should go and look when you buy something to make sure that before you gift it, it originally came with warnings or that it has been properly tested to make sure it's safe or to make sure that there is some basis upon which you can provide that gift to someone else knowing that it's not going to cause any harm.

That's their theory. So the first part, Your Honor, goes out the door, the -- the whole duty or obligation by Ms. Mardouchoc to be on notice that when she walked in the store that day and said, hmm, you know, this firepot should have something on it; it's not there; I'm not going to buy it; I'm not going to gift it, because I think there should be something there. So those four duties go out the door.

Then what remains? The only factual predicate which is a matter of law for the court to decide. Was there a shred of evidence that allows the plaintiffs to suggest that Ms. Mardouchoc had notice, that she should have been in a position when she gifted it to the Magagnolis that, hey, there's -- there could be a problem with this product.

And what we find, Your Honor, is that Mr. Kwass, not Mr. Mongeluzzi, had every opportunity at her deposition to test their theory. He covered extensively her knowledge of firepots. None. Covered extensively her prior purchases of firepots. None. Covered extensively her -- her professional career to assess maybe -- maybe you've done things in the past that would have put you on notice to think, this could be a dangerous product. None.

They actually then went into covering all of her communications with Mr. Magagnoli for 15 months after it was gifted to determine at any point maybe did Mr. Magagnoli say, hey, there's no snuffer; hey, this thing -- I don't know how to put it out, or this could be dangerous.

Not one ounce of evidence to suggest anything that put her on notice that this product either should have had warnings or the proper use of it.

And, finally, of course, they go in and

test, did you look at Twitter? Did you look at X? Did you look at Y? Did you receive notification from Wegmans?

It's shocking that they're coming up here and arguing today that possibly -- he gave you nine scenarios. Those scenarios were eliminated by the factual record. We're not here to talk about guess and speculation.

I don't -- I -- I treat these very seriously when I'm claiming that someone's been fraudulently joined, and that's why we waited.

We didn't challenge this apparent fraudulent joinder when the Complaint was filed. We did the right thing. We tested to make sure that we knew the factual predicates of 388 were satisfied.

They haven't satisfied any of them. They haven't offered one fact in their brief, not one. Even what he said today about the scenarios isn't in their brief because they know they can't put it into court.

They can't file that because Mr. Kwass was there and looked her in the eye and even said, how about Twitter; how about these news presses; how about these recalls; how about Wegmans' recalls; didn't you receive anything at all to say, I better call him; I better tell Mr. Magagnoli that there might be an issue out here.

Absolutely nothing, Your Honor. There is nothing in the record to support the other requirement here.

The first is the duty as a matter of law. You can rule on that. There is no basis to force Ms. Mardouchoc to determine the history of a product.

The only question that you have to assess, Your Honor, is, did she have knowledge?

The four cases they cite from 1940 --

THE COURT: Well, knowledge of what?

MR. LEARY: Knowledge of anything about the product, any potential whatsoever that this product should have had warnings or should have been operated a certain way.

THE COURT: Well, don't you know that? Isn't that common sense? If I'd give you a propane grill, I would know that it could explode.

MR. LEARY: So would Mr. Magagnoli.

THE COURT: Right.

MR. LEARY: There would be no need to warn him. But here --

You raise an excellent point, of which

they're dead silent on. How do you -- how do you light this thing? How do you -- how do you light it?

You don't just put a match in. You don't -- it just doesn't come up. What do you do? You put a fuel source in. She bought the fuel source with the box -- with the pot, bought the fuel source.

What does it say on there? The same exact warnings, if not more. The fuel gel container -- excuse me -- has all the warnings.

They admit they have it. They gave me an exemplar.

So Mr. Magagnoli, in fact, did have the information. He had -- everything that she purchased she gave to him. Everything. So that was already there, Your Honor.

I'll just touch on it just because I find it just more indicative of their lack of any support in this case. They throw four cases at Your Honor from the 1940s from Minnesota and Massachusetts. That's it. That's all they can offer.

And those four cases all stand for the one proposition that they can't prove in this case. The defendant in every one of those cases had specific knowledge of the danger of the product, either because they had had prior experiences where that -- that product had reared its defect or, more importantly, the defendant was the manufacturer, the defendant who made the product and then handed it off and knew or should have known what the warnings are.

None of those facts here, Your Honor, are present. So to sit here today and listen to counsel shockingly talk about scenarios that could have played out, in the face of an uncontroverted record, Your Honor, in no way creates some type of issue of fact.

And not surprisingly, they now, as an alternative, claim that this may be a case of first impression. I don't see how this is a case of first impression at all. Courts have repeatedly assessed any of the necessary factual predicates to proceeding under Restatement 388 and, as a matter of law, have ruled what a party's duty is.

So the duty issue, again, is easy. That -- the duty part is done. They haven't countered it. They have no case law support to suggest that the day she bought it, she should have pried a little bit, because that puts you in the same position --

THE COURT: Well, what about the

alternative theory, that Wegmans can come into court and say they sold it to her with the box and the top? So --

MR. LEARY: There's no contention at all. That's their contention. We have never contended that. We have never contended that we sold it in a box and that it went out the door in a box.

It was on a shelf. It was on a display. It came with the fuel gel container. The fuel gel container clearly had all the warnings and instructions.

So for them to try to create an issue of fact is just completely wrong.

THE COURT: So you're saying you sold it to her without a top on it?

MR. LEARY: We sold it to her as the product was -- came off the shelf.

But even if we sold it without a top, there's -- that's not the debate here. The debate is whether Ms. Mardouchoc should have known it had -- should have had a top.

Any of those facts, Your Honor, I -- I grant it, fair game.

THE COURT: Wouldn't the same standard be that there's absolutely no evidence against her?

And if one defendant is saying something that could lead to her culpability, then she'd be in the case --

MR. LEARY: There's --

THE COURT: -- and that would [indiscernible].

MR. LEARY: Your Honor, there was no need for Wegmans to produce an affidavit. There wasn't one line of testimony that we ascertained, either from the witness or from her -- her counsel, was false. There was nothing in there that was deemed to be false.

She bought the product. She's going to be the person that's in the best position. She bought it on the shelf, put it in a bag, and gave it over. That's where the source here is, and that's why she's been fraudulently joined.

And, again, we waited, Your Honor, to make sure we had that extrinsic evidence, to make sure that we tested to say, hey, maybe there's a debate, maybe she had an ounce of knowledge.

I concur. If she testified under oath that, you know what, I -- I've used it in the past; I've had a problem myself, or I read some articles; I was aware that there was issues here, and I went and got my hair done, and I never told him that day, or I knew that there was a potential that their child could somehow get burned because of his activity, that's -- that goes to the merits --

THE COURT: How are these things lit?

MR. LEARY: They're lit by pouring the gel into the container. And once the gel is in the container, you light the gel.

THE COURT: How do you light the gel?

MR. LEARY: With a match, lighter, anything that could ignite it. And then, as --

THE COURT: But it doesn't -- what? Do you drop the match in --

MR. LEARY: No, you --

THE COURT: -- or do you use one of those things -- you use, like, a wand?

MR. LEARY: You can use a wand. You can use -- you could put a match right on it, or you could use a -- you know, one those long things that you might light a gas grill with.

I -- again, we don't know how Mr. Magagnoli lit it that day. We don't know, you know, what -- under what circumstances they -- I'm finding out today for the first time that he didn't use it for over a year and a half after it was gifted to him. I didn't know that, but it really doesn't go to the merits here, except for the fact there was no communications that -- that this court has to look at.

Are there any objective facts that would suggest a reasonable basis under the law to support a claim under Restatement 388? Because that's their only claim.

There are no objective facts. If there were, it would have been the first page of Mr. Kwass's brief: Your Honor, a question; did she know; did she not know; here's what I elicited from her.

He did his best. He prodded -- poked and pried, but there was nothing that came out of that deposition.

THE COURT: So there was a recall, though.

MR. LEARY: There was a recall.

THE COURT: And Wegmans was notified of the recall?

MR. LEARY: Absolutely.

THE COURT: But Wegmans didn't notify its customers?

MR. LEARY: It did, sure. It sent it out.

THE COURT: What do you mean?

MR. LEARY: They called -- they either called or sent a letter.

THE COURT: Well, now, wouldn't that be evidence she knew there was a recall?

MR. LEARY: She -- there was no notification whatsoever that she had been notified of a recall.

There is an issue. She apparently had two different lines of information that she gave to Wegmans regarding her contact information. The -- what she initially signed up for was under her daughter's name, and --

But there's no information from her whatsoever that there was notification of the recall or anything to do with the -- any dangers or defects with the product.

THE COURT: So its Wegmans' position that they tried to contact her, but she didn't get it?

MR. LEARY: Yeah. Wegmans put up a sign in the store. Wegmans tried to contact anyone on their -- on the distribution list that appeared to have bought a product. And they may have -- I don't know if they sent a mailer. I don't think they did.

I think it was by communication by phone. So --

THE COURT: Well, even if they sent a mailer, it would be somebody on their mailing list, right?

MR. LEARY: Right. And she may not have been on it because she had used her daughter's card.

THE COURT: Right.

MR. LEARY: So --

THE COURT: But do you need a card, or what do you mean?

MR. LEARY: You have, like, a Wegmans' -- you can use a -- it's like a Costco card.

THE COURT: But you don't have to have one?

MR. LEARY: No.

THE COURT: I could walk into --

MR. LEARY: No.

THE COURT: -- Wegmans today and --

MR. LEARY: Right. And --

THE COURT: -- pay cash.

MR. LEARY: And if you paid cash, there would be no way for us to notify you. There would be no way to -- for us to track you, that you had bought it, you know, a year before or two years before.

And so you have -- every single comment, Your Honor, to 388 -- I don't want to beat a dead horse, but there is a necessary requirement. And -- and if they had offered anything or elicited anything, you know, on pure conjecture at this point, that she had notice to put her in that position to tell the Magagnolis, either the day she gifted it or 15 months later, then I would certainly suggest that maybe there is an objectionable fact at issue here.

But having done that and having taken the testimony of her and covered every single one of the elements of their Complaint verbatim just so I didn't miss anything allows us to put forward a record, Your Honor, that hasn't been refuted, not only on the facts but, certainly, the case law. The brief is silent on the case law issue.

All right. Thank you.

THE COURT: Thank you.

Five minutes.

MR. MONGELUZZI: Yes, Your Honor.

THE COURT: No more than five minutes.

MR. MONGELUZZI: Thank you, Your Honor.

I guess I was somewhat startled by Mr. Leary's comment, I don't think they sent or mailed the recall; I'm not sure.

They want this court to declare that we

filed a frivolous lawsuit against her when they can't even articulate and answer Your Honor's question about whether or not you contacted her for a recall.

THE COURT: Well, the word -- the word "frivolous" in this setting just means without merit. It doesn't -- I don't think it means the -- you know, I don't think it means what people generally think of as frivolous.

MR. MONGELUZZI: Yes, Your Honor.

THE COURT: So I think the issue is, is there any relevant evidence that somebody can find liability against the defendant?

MR. MONGELUZZI: Sure. The -- and -- and I'll [indiscernible] this. I don't think there's any doubt under 388 if -- under 388, we have to prove that the defendant knew or should have known about the information.

If she got the box and didn't give the box to the plaintiffs, that's about as clear a violation of 388 as you can get, because this is -- has the only --

THE COURT: His point is there's no evidence she got the box.

MR. MONGELUZZI: They denied that they sold it without the box and the packaging.

So now, imagine me. I'm in -- the plaintiff. They denied --

THE COURT: No, that's -- that's not what he said.

MR. LEARY: That's not what I said.

MR. MONGELUZZI: That's what their Answer says.

THE COURT: He said she denied it.

MR. LEARY: It's the Complaint. That was a different section of the Complaint, Bob. It wasn't to Wegmans.

MR. MONGELUZZI: It was. 69R.

By the way, I was somewhat puzzled when you said 69R --

Pardon my back, Your Honor.

-- isn't --

MR. LEARY: Is under what count?

MR. MONGELUZZI: Count 6, negligence. Plaintiffs Magagnoli v. the Wegmans defendants, 69R, selling, supplying, and distributing the firepot without its packaging which contained warnings.

MR. LEARY: Can we just, for the record -- because maybe I'm reading the wrong one, Bob. I might be. But I -- I had Count 4, strict product liability.

MR. MONGELUZZI: I'm -- I am here.

MR. LEARY: And I have 69R. This is Count 6, negligence. 69R.

MR. MONGELUZZI: Selling, supplying, and distributing the firepot. We made that --

MR. LEARY: [Indiscernible.]

MR. MONGELUZZI: -- allegation against Wegmans. They denied it. I'm now in a position where Wegmans says, we sold it with the packaging. Ms. Magagnoli says, they didn't sell it with the packaging.

They want Your Honor to conclude as a matter of law with that factual predicate -- to accept one version and not the other version and without giving us any opportunity to depose them on this.

So I just want to turn to the legal standard of 388, because I didn't address it.

We have to prove that the defendant had -- knows or has reason to know that the chattel was likely to be dangerous for the use which it is supplied, no reason to believe those for who the use of the chattel was supplied will realize its dangerous condition, and fails to exercise reasonable care to inform that of that dangerous condition.

That's not giving them the box, because that -- if they have the box, they have the information, and my clients don't.

I note that Mr. Leary in his papers says -- under comment G, he highlights this. The duty which the rules stated in this section imposes upon a supplier of chattel for another's use is to exercise reasonable care to give to those who were to use the chattel the information which the supplier possesses.

That information would be the box and the snuffer lid, and there is an open factual question, as we've pled, as to whether or not that was supplied by Wegmans to Ms. Mardouchoc and whether she gave it to our clients.

Lastly, Your Honor, you asked him, what -- did you sell this without the top? And Mr. Leary's response was, even if we sold it without the top, that's not relevant.

Wegmans hasn't even come in here today, when you've asked him specifically and repeatedly, and said, on the record, let me tell you, we sold it without the box; we sold it without the warnings and instructions; and we sold it without the snuffer lid.

THE COURT: Well, if he sold it without

the top, it would not necessarily be relevant as to her, because she wouldn't know whether or not a top is supposed to be on it.

MR. MONGELUZZI: If she had the box, she would know that, Your Honor, because the box shows the top. So --

THE COURT: But I think my question was focused, like, if it really is on the shelf wrapped with something, is there a top on it or not? I mean -- so --

MR. MONGELUZZI: Those are all open questions and just highlight why the claim that we fraudulently joined Ms. Mardouchoc should fail.

Thank you, Your Honor.

THE COURT: All right. Thank you. I mean -- and I agree that, yes, if there was a box, someone would know there would be a top.

MR. MONGELUZZI: Thank you, Your Honor.

THE COURT: I agree -- I agree with your point. I didn't want to cut you off there.

All right. Very interesting argument, gentlemen. Thank you. I'll take the matter under advisement, and I'll render a decision --

MR. MONGELUZZI: Oh, Your Honor -- I'm sorry, Your Honor. I meant to say one thing.

In the alternative, if Your Honor is considering not remanding this case, we would at least like the opportunity, since there are contested issues -- which we believe that, in and of itself, should compel remand -- to have a targeted 30-day opportunity to depose Wegmans and to depose Bird Brain on those issues.

We believe that it is ripe for remand, but if Your Honor has doubt about those, that would be our alternative.

Thank you, Your Honor.

MR. LEARY: I have no objection. I'll be glad to produce a Wegmans person to discuss whether the product that was sold on their shelves came with packaging or not.

THE COURT: Somebody from that particular store?

MR. LEARY: Sure. I can try to find some other store, but someone --

THE COURT: Is there somebody from Bird Brain to depose?

MR. LEARY: Well, it wouldn't really matter, to be honest with you. If he wants to depose Bird Brain, they can. It's not going to get him anywhere, because Bird Brain could say, we sent

Wegmans the packaging. It's up to what Wegmans did. But if he wants to depose Bird Brain, there is someone that's still there.

THE COURT: Now, why don't they have counsel? Is there an indemnity agreement?

MR. LEARY: I think they've gone out of business.

THE COURT: Oh, okay.

MR. LEARY: So, Your Honor, if you've got -- if you want to take that under consideration, I can work with counsel and try to track someone down. Most likely, they're going to be in Rochester, but we can do it by phone.

If there's something that will allow this court further information to determine if Ms. Mardouchoc --

THE COURT: I don't think it would be necessary to depose Bird Brain initially. If I would do that, I would order you depose somebody from Wegmans within 30 days. And, then, if you would show ample reason why, after that, you'd still need to depose somebody from Bird Brain for this reason or purpose only, you know, then I would allow it.

MR. MONGELUZZI: Yes, Your Honor.

MR. LEARY: That's fine.

THE COURT: All right. So I'm going to review the pleadings again and the Restatement and your briefs, and I'll render a decision.

Thank you.

MULTIPLE SPEAKERS: Thank you, Your Honor.

- - -

(Whereupon, the proceeding was concluded at 10:54 a.m.)

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C E R T I F I C A T I O N

I, Judi Y. Olsen, Registered Professional Reporter, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

October 21, 2015 ______________________

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